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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

ELIZABETH G. AUGUSTUS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The undersigned, on behalf of Elizabeth G. Augustus, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above cause on February 14, 1941, affirming a decision of the Board of Tax Appeals.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 57) is reported in 40 B. T. A. 1200. The opinion of the Circuit Court of Appeals (R. 79) is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 14, 1941 (R. 77). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether property sold by the petitioner, or becoming worthless, in 1935 and 1936, and which she received in 1928 from a testamentary trust established under her father's will in 1922, was "acquired" by her in 1922 or in 1928 within the meaning of § 113(a)(5) of the Revenue Acts of 1934 and 1936.

Statute Involved.

The statute directly involved in this case is § 113(a)(5) of the Revenue Acts of 1934 and 1936. The relevant portion of this statute reads as follows:

> If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition.

Statement.

The facts in this case were stipulated (R. 36). The facts stated in the Board's opinion (R. 57) are drawn from this stipulation. They may be summarized as follows:

On July 13, 1922, Daniel Good died testate, a resident of the city of Buffalo, New York, leaving as his widow, Sarah E. Good, and leaving as his only descendants their two daughters, Margaret Jane Good and this petitioner, named in the will as Frances Elizabeth Good. His last will and testament was duly admitted to probate in the Surrogate's Court of Erie County, New York. After making certain specific bequests the will, in Item Eleventh, directed the executors or the survivor of them to divide the remainder into four equal parts, one of which was to go to each of the daughters, and the other half was transferred to the executors in trust to pay the income to the testator's widow for her life with the right in her

> to use so much of the principal of said fund as she may desire, and only the residue of the principal of

said fund so remaining at her death shall be disposed of as herein next provided.

Item Eleventh then continued:

(3) I hereby give to my said wife, and expressly invest her with power and authority to dispose of one-half of the balance of said fund so invested in trust for her by her last will and testament in such manner as to her may seem best; and the other one-half of the balance of said trust fund I hereby give, devise and bequeath to my legal heirs and assigns forever.

The will of Daniel Good named his wife Sarah E. Good and Seymour H. Knox as Executors and Trustees. As Mr. Knox had predeceased the testator, the widow was appointed sole Executor and sole Trustee and continued to act as such until her death, which occurred on November 9, 1928. She died intestate and left as her only heirs-at-law the two daughters of herself and of Daniel Good, and the two daughters were the sole heirs-at-law of Daniel Good at the time of the death of their mother. The widow did not exercise her right to consume the principal of the trust fund under the will of her deceased husband or to make testamentary disposition of one-half of the residue of the fund remaining at her death, as provided in Item Eleventh of the will of Daniel Good. Upon the death of her mother, the petitioner received certain securities from this testamentary trust under Item Eleventh.

In 1935 and 1936 the petitioner sold shares of the common stock of the F. W. Woolworth Company which she had acquired from the testamentary trust. The fair market value of such shares at the time of the death of the testator in 1922 was $10.8666 per share. The value of these shares at the date of death of her mother in 1928 was $86.70 per share. (R. 39.) In addition to the Woolworth stock received from the testamentary trust, the petitioner also sold in 1935 an interest in Canadian real estate which she had received from the trust; and in 1936 she sold other securi-

ties which came from the testamentary trust, and certain stock of the Willys-Overland Company derived from the trust became worthless. The stipulation sets forth in detail the facts with respect to the dates, cost bases, and percentages of gain or loss to be taken into account with respect to these items of property. (R. 53.)

Of the shares of Woolworth stock acquired by the petitioner from the testamentary trust more than one-half had been sold before the taxable years in question; and no records have been kept by the petitioner or elsewhere to distinguish between (1) those shares acquired from that half of the residue of the testamentary trust as to which Sarah Good had the power of testamentary disposition, and (2) those shares acquired from that half of the testamentary trust which under the will of Daniel Good was to go to his legal heirs. Prior to these proceedings, there had been no occasion for keeping such records. (R. 43.)

The Board held that the property in question had been "acquired" upon the death of Daniel Good in 1922, and entered its order accordingly. (R. 57, 67.) Five members of the Board dissented, with an opinion. (R. 65.) The Circuit Court of Appeals affirmed this decision.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that with respect to the property in question, the "time of such acquisition," as that term is used in Sections 113(a)(5) of the Revenue Acts of 1934 and 1936, was the date of the father's death rather than the date of the death of the mother.

2. In holding that "the time of such acquisition" under Sections 113(a)(5) of the Revenue Acts of 1934 and 1936 does not depend upon the nature and infirmities of the interests in question, but means in any case, regardless of the circumstances, the date of the death of the original testator.

3. In holding that "time of such acquisition," as used in Sections 113(a)(5) of the Revenue Acts of 1934 and 1936, means the date of the death of the decedent as to all property acquired from the decedent "by bequest, devise or inheritance," regardless of whether the title to the property thus acquired was conditional or vested or contingent as of the date of death of the decedent.

4. In holding that a Committee Report of the House Committee on Ways and Means accompanying the Revenue Act of 1934 was controlling in construing Section 113(a)(5) of that Act and of the Revenue Act of 1936, despite the fact that the language actually used by Congress in the statutes was a verbatim reenactment of earlier acts which had uniformly been given a contrary construction by the Treasury, the Board and the courts.

5. In affirming the decision of the Board that there is a deficiency in the petitioner's income taxes in the amount of $73,143.92 for 1935 and $41,386.34 for 1936.

Reasons for Granting the Writ.

1. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Reynolds v. Commissioner,* 114 F. (2d) 804, in which case this Court granted a writ of certiorari on February 17, 1941, No. 684, October Term 1940. The question presented is also the same as that involved in the petition filed in the case of *Cary v. Commissioner,* Nos. 734-737, October Term, 1940.

2. The decision below involves an important question in the administration of the internal revenue laws, which is probably in conflict with applicable decisions of this Court, in that:

(a) it did not give sufficient weight to the distinction made in *Helvering v. San Joaquin Co.,* 297 U. S. 496 (1936), between the acquisition of an interest in property and the acquisition of the property itself; and

(b) it failed to give proper effect to the long-continued administrative construction and settled judicial interpretation at the time the statute was enacted, contrary to the decision of this Court in the recent cases of *Helvering v. Janney, Taft v. Helvering,* and *Helvering v. Oregon Mutual Life Ins. Co.,* all decided December 9, 1940; and

(c) it treated as a contemporaneous administrative construction a regulation issued in 1935, dealing with language which was first enacted in the revenue laws in 1921, and which had continuously received a different construction during the intervening fourteen years; and

(d) it held that the subsequent reenactment of the statutory language constitutes an approval of the regulation, despite the fact that the same statutory words were three times previously reenacted while a contrary administrative construction was continuously in effect (*cf. Helvering v. R. J. Reynolds Tobacco Co.,* 306 U. S. 110 (1939)); and

(e) it followed the decision in *Van Vranken v. Helvering,* 115 F. (2d) 709 (C. C. A. 2d, 1940), which misapplied this Court's decision in *Helvering v. Hallock,* 309 U. S. 106, by failing to see that even though the technical distinction between vested and contingent interests should not control in the construction of the revenue act, it does not follow that an interest has been "acquired" when it is in fact conditional, and that, indeed, the decision in the *Hallock* case leads to the conclusion that such an interest has not been "acquired." The *Van Vranken* decision overlooked the impossibility, to taxpayer and Government alike, of fairly and efficiently administering a tax system which makes the construction of a statute first passed in 1921 and reestablished in the same words in 1934, turn upon "an unanalyzed and intuitive conclusion" (see 115 F. (2d) at 711) based upon a decision of this Court in 1940 involving unrelated language in a different statute. It also overlooks the fact that it is not the responsibility or the proper function of

the courts to make up supposed deficiencies in the statutes as Congress has written them.[1]

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ORVILLE SMITH,
ERWIN N. GRISWOLD,
Counsel for Petitioner.

February, 1941.

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[1] *Cf. Helvering v. Wood*, 309 U. S. 344, 347 (1940): "We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it."

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 819

ELIZABETH G. AUGUSTUS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The question presented is as to the proper basis, under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936, for determining gain or loss upon sales of securities which petitioner received from a testamentary trust. Section 113 (a) (5) provides that the basis for property "acquired by bequest, devise, or inheritance," shall be its value "at the time of such acquisition." Petitioner was the remainder beneficiary of the trust; the testator died in 1922 and the life tenant under

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the trust died in 1928. Petitioner contends that she "acquired" the property at the death of the life tenant and that its basis is its value on that date. The Government contends that she "acquired" the property upon the death of the testator, and that its basis is its value on that date.

Substantially the same question is before this Court in *Helvering* v. *Reynolds,* 114 F. (2d) 804 (C. C. A. 4th), certiorari granted, No. 684, this Term, and in *Cary* v. *Helvering,* and associated cases, 116 F. (2d) 800 (C. C. A. 2d), certiorari granted, Nos. 734–737, this Term.[1] Therefore, we do not oppose the granting of a writ in the present case, but suggest that the Court may wish to withhold action on the petition for certiorari in the present case pending disposition of the *Reynolds* and *Cary* cases.

Further, other related questions have already been argued before this Court in *Maguire* v. *Helvering,* No. 346, this Term, and *Helvering* v. *Gambrill,* and associated cases, Nos. 472–475, this Term and it may be that the decisions in those cases will substantially dispose of the questions in the present case and in the *Reynolds* and *Cary* cases.

If the outcome of the present cases should depend, contrary to the Government's contention,

[1] The same question is also presented by the petition for certiorari in *Van Vranken* v. *Helvering*, No. 836, this Term.

upon whether the interests of petitioners under the trust were "vested" or "contingent", we wish to reserve the right to contend that the interests were vested rather than contingent.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 819.

ELIZABETH G. AUGUSTUS, *Petitioner,*

v.

GUY T. HELVERING, *Commissioner of Internal Revenue.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY MEMORANDUM FOR THE PETITIONER.

ORVILLE SMITH,
ERWIN N. GRISWOLD,
Counsel for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 819.

ELIZABETH G. AUGUSTUS, *Petitioner,*

v.

GUY T. HELVERING, *Commissioner of Internal Revenue.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY MEMORANDUM FOR THE PETITIONER.

The Solicitor General does not oppose the granting of the writ in the present case, but suggests that the Court may wish to withhold action on the petition pending disposition of the *Reynolds* and *Cary* cases.

We submit that the petitioner should have her day in court if her case is to be controlled by the decision which this Court reaches. She should not be foreclosed without an opportunity to present to the Court the arguments which are applicable to the facts in her case. Her counsel believe that they may be of assistance to the Court in its consideration of the problem of statutory construction upon which the case turns.

The Solicitor General also suggests that the decision of this Court in the pending cases of *Maguire* v. *Helvering,*

No. 346, and *Helvering* v. *Gambrill*, Nos. 472-475, may "substantially dispose" of the question in the present case. But the *Maguire* and *Gambrill* cases involve the construction of words in the Revenue Acts of 1928 and 1932, while the present case involves the construction of different words in the 1934 and 1936 Acts, with a wholly different pattern of legislative history and of administrative and judicial construction. The decision reached in the *Maguire* and *Gambrill* cases may or may not have a bearing on the present case, but the petitioner should have an opportunity to present that question to the Court.

Respectfully submitted,

ORVILLE SMITH,
ERWIN N. GRISWOLD,
Counsel for Petitioner.

March, 1941.